

DOCKET NO. 2010-1196-WR

APPLICATION NO. 14-1333A BY CITY	§	BEFORE THE TEXAS COMMISSION
OF SAN ANGELO FOR AMENDMENT	§	
TO CERTIFICATE OF ADJUDICATION	§	ON
NO. 14-1333	§	
	§	ENVIRONMENTAL QUALITY

**RESPONSE TO REQUESTS FOR
CONTESTED CASE HEARING**

TO THE HONORABLE COMMISSIONERS:

The City of San Angelo ("San Angelo") submits this response to requests made to the Texas Commission on Environmental Quality ("TCEQ") for a contested case hearing on the above-referenced application, and shows as follows:

I. BACKGROUND

San Angelo owns Certificate of Adjudication ("COA") No. 14-1333, which currently authorizes the diversion of 184 acre-feet of water per year from a point on the north bank of the Concho River¹ at a maximum rate of 4.22 cfs (1900 gpm) to be used for agricultural irrigation purposes on a certain 121 acres of land in Tom Green County.

II. PROCEDURAL HISTORY

On August 13, 2007, San Angelo filed Application No. 14-1333A with the TCEQ to add (i) a municipal purpose of use; (ii) San Angelo's service area as a place of use; and (iii) an additional diversion point 12.5 stream miles downstream from the existing diversion point (the "Application"). The additional diversion point is at a point that is currently authorized for other diversions by San Angelo under COA No. 14-1357. The Application proposes no change in the volume or rate of diversions currently authorized in COA No. 14-1333.

TCEQ staff declared the Application to be administratively complete on August 10, 2009. TCEQ staff determined that the proposed changes in the Application would have no practical impact on any other water right holder in the Colorado River Basin. Accordingly, notice was only mailed to interjacent water right holders of record between the existing and proposed diversion points as required by Title 30, Section 295.158(c)(2)(D) of the Texas Administrative Code.

Notice of the Application was mailed to interjacent water rights holders on September 14, 2009. Requests for a contested case hearing on the Application were due to the TCEQ Chief Clerk's office no later than October 5, 2009. Three requests for a contested case hearing were filed,² as noted below, but only two of the hearing requestors are interjacent water rights holders who received mailed notice of the Application.

¹ Specifically, water may be diverted "[a]t a point on the north bank of the Concho River which is S 7°30'E, 7235 feet from the northwest corner of the Conrad Stegman Survey 337, Abstract 1869, Tom Green County, Texas."

² Two of the hearing requests that were filed appear to have been filed on behalf of multiple parties. San Angelo addresses requests for each possible party separately below.

On February 18, 2010, TCEQ staff issued a draft permit amending COA No. 14-1333 pursuant to the Application (the "Draft Permit"). On February 22, 2013 San Angelo received notice that the above-referenced matter would be considered by the Commission at the March 27, 2013 agenda. San Angelo hereby submits this response to requests made to the TCEQ for a contested case hearing on the Application, pursuant to Title 30, Section 55.254 of the Texas Administrative Code.

III. DETERMINATION OF AFFECTED PERSONS

TCEQ rules make clear that a contested case hearing can only be requested by 1) the TCEQ Commissioners, 2) the TCEQ Executive Director, 3) the Applicant, and 4) any "affected person."³ An affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the Application.⁴ An interest common to members of the general public does not qualify as a personal justiciable interest.⁵ Accordingly, a request for a contested case hearing must include a brief, but specific, description of the person's location and distance relative to the activity that is the subject of the Application.⁶ In addition, the person must do more than just provide a conclusory statement in the request that he or she will be harmed by the proposed change. The person must describe briefly, but specifically, how and why he or she will be affected by the change proposed in the Application.⁷

Persons claiming to be affected persons must also submit their hearing requests in writing to the Chief Clerk "within the time period specified in the notice."⁸ For purposes of the Application, the notice directed all potential requestors to submit their requests for a contested case hearing on the matter to the Chief Clerk on or before October 5, 2009. Thus, all timely hearing requests must have been received by the Chief Clerk by October 5, 2009.⁹ All such requests not filed within this period are not timely and thus cannot be processed by the Chief Clerk.¹⁰

When determining whether an individual or entity is an "affected person," all relevant factors are considered by the Commission, including: 1) whether the interest claimed is one protected by the law under which the application will be considered; 2) distance restrictions or other limitations imposed by law on the affected interest; 3) whether a reasonable relationship exists between the interest claimed and the activity regulated; 4) the likely impact of the regulated activity on the health, safety, and use of property of the person; and 5) the likely impact of the regulated activity on use of the impacted natural resource by the person.¹¹

IV. EVALUATION OF HEARING REQUESTS FOR APPLICATION 14-1333A

1. Van W. Carson

Van W. Carson submitted a hearing request on his own behalf on September 28, 2009. While this request appears to have been timely submitted, it nevertheless fails to satisfy the

³ 30 Tex. Admin. Code § 55.251(a) (2012).

⁴ *Id.* at § 55.103.

⁵ *Id.*

⁶ *Id.* at § 55.251(c)(2).

⁷ *Id.*

⁸ *Id.* at §§ 55.251(b), (d), .254(a).

⁹ *Id.* at §§ 55.251(b), (d).

¹⁰ *Id.* at §§ 55.251(f)(1), .254(a).

¹¹ *Id.* at § 55.256(c).

substantive requirements of Title 30, Section 251 of the Texas Administrative Code. Specifically, Section 55.251(c)(2) requires a requestor to briefly, but specifically, describe how and why the changes proposed in the Application will affect him. Mr. Carson's hearing request fails to meet this requirement because he has failed to sufficiently explain how or why the changes will specifically affect him. Instead Mr. Carson has simply stated that the change of use will "severely impair, impact and jeopardize our water rights by altering demands on and the flow of the Concho River." This explanation is conclusory, and thus not sufficient to meet the requirements of Section 55.251(c)(2).

In addition, TCEQ staff have determined that the change requested in the Application would have no practical effect on any water right. Given this fact, it would appear to be particularly incumbent upon Mr. Carson to identify with some specificity how and why his unidentified water right will be impaired by Application 14-1333A. Unfortunately, the request does neither.

Accordingly, this request fails to identify any justiciable interest affected by the Application. As a consequence, it is impossible to determine that this requestor is an affected person using any relevant factors, including those enumerated in Title 30, Section 55.256 of the Texas Administrative Code.

Van W. Carson's request should not be granted.

2. Sandra Carson Birnie

In addition to submitting a hearing request on his own behalf, it appears that Van Carson also submitted a hearing request on behalf of Sandra Carson Birnie on September 28, 2009. Nothing in the request, however, indicates that Van Carson is authorized to act, or speak, on behalf of Sandra Carson Birnie. Accordingly, it is not clear that the interests of the Sandra Carson Birnie have been properly, or accurately, presented in the hearing request.

While this request appears to have been timely submitted, it nevertheless fails to satisfy the substantive requirements of Title 30, Section 251 of the Texas Administrative Code. Specifically, Section 55.251(c)(2) requires a requestor to briefly, but specifically, describe how and why the changes proposed in the Application will affect her. Ms. Birnie's hearing request fails to meet this requirement because she has failed to sufficiently explain how or why the changes will specifically affect her. Instead she has simply stated that the change of use will "severely impair, impact and jeopardize our water rights by altering demands on and the flow of the Concho River." This explanation is conclusory, and thus not sufficient to meet the requirements of Section 55.251(c)(2).

In addition, TCEQ staff have determined that the change requested in the Application would have no practical effect on any water right. Given this fact, it would appear to be particularly incumbent upon Ms. Birnie to identify with some specificity how and why her unidentified water right will be impaired by Application 14-1333A. Unfortunately, the request does neither.

Accordingly, this request fails to identify any justiciable interest affected by the Application. As a consequence, it is impossible to determine that this requestor is an affected person using

any relevant factors, including those enumerated in Title 30, Section 55.256 of the Texas Administrative Code.

Sandra Carson Birnie's request should not be granted.

3. Carson Farms

It appears Van Carson also submitted a hearing request on behalf of Carson Farms on September 28, 2009. Nothing in the request, however, indicates that Van Carson is authorized to act, or speak, on behalf of Carson Farms. Accordingly, it is not clear that the interests of the Carson Farms have been properly, or accurately, presented in the hearing request.

While this request appears to have been timely submitted, it nevertheless fails to satisfy the substantive requirements of Title 30, Section 251 of the Texas Administrative Code. Specifically, Section 55.251(c)(2) requires a requestor to briefly, but specifically, describe how and why the changes proposed in the Application will affect him. Carson Farms' hearing request fails to meet this requirement because it has failed to sufficiently explain how or why the changes will specifically affect it. Instead it has simply made the statement that the change of use will "severely impair, impact and jeopardize our water rights by altering demands on and the flow of the Concho River." This explanation is conclusory, and thus not sufficient to meet the requirements of Section 55.251(c)(2).

In addition, TCEQ staff have determined that the change requested in the Application would have no practical effect on any water right. Given this fact, it would appear to be particularly incumbent upon Carson Farms to identify with some specificity how and why its unidentified water right will be impaired by Application 14-1333A. Unfortunately, the request does neither.

Accordingly, this request fails to identify any justiciable interest affected by the Application. As a consequence, it is impossible to determine that this requestor is an affected person using any relevant factors, including those enumerated in Title 30, Section 55.256 of the Texas Administrative Code.

Carson Farms' request should not be granted.

4. A. J. Jones, Jr.

A. J. Jones, Jr. submitted a hearing request on his own behalf on September 25, 2009. While this request appears to have been timely submitted, it nevertheless fails to satisfy the substantive requirements of Title 30, Section 251 of the Texas Administrative Code. Specifically, despite the clear requirements of Section 55.251(c)(2) to briefly, but specifically, describe how and why the change proposed in the Application will affect the requestor, nothing in this request gives any indication of how, or why, the Application will affect the rights provided by COA No. 14-1397. Instead, Mr. Jones simply states that the changes requested in the Application "could impact and impair" COA No. 14-1397. This explanation is conclusory, and thus not sufficient to meet the requirements of Section 55.251(c)(2).

This substantive deficiency in the request is particularly glaring given the fact that Certificate of Adjudication No. 14-1397 is not an interjacent right between COA 14-1333 and the additional diversion point requested in the Application. In addition, TCEQ staff have determined that the changes requested in the Application would have no practical effect on any water right. Given this fact, it would appear to be particularly incumbent upon Mr. Jones to identify with some specificity how and why his COA No. 14-1397 will be impaired by Application 14-1333A. Unfortunately, the request does neither.

Accordingly, this request fails to identify any justiciable interest affected by the Application. As a consequence, it is impossible to determine that this requestor is an affected person using any relevant factors, including those enumerated in Title 30, Section 55.256 of the Texas Administrative Code.

A. J. Jones, Jr.'s request should not be granted.

5. Concho River Basin Water Conservancy Association

The Concho River Basin Water Conservancy Association (the "Association"), through A. J. Jones, Jr., submitted a request for a contested case hearing on Application 14-1333A. As an initial matter, the Association has not provided any demonstration that it is, in fact, a legitimate organization comprised of any members, and particularly those members it purports to speak on behalf of in its hearing request. It is important to understand whether, in fact, any of its purported members are in fact members of the Association, and most importantly, were in fact members at the time that the Association submitted its hearing requests.

Additionally, an association may request a contested case hearing only if it meets the requirements set forth in Title 30, Section 55.252 of the Texas Administrative Code. For the Association to have standing to request a contested case hearing, Section 55.252(a) requires one or more of its members to otherwise have standing to request such a hearing on their own right.¹² The Association lists a single certificate of adjudication—COA No. 14-1397, held by A. J. Jones, Jr.—in the Concho River Basin that it claims is held by its members. As discussed above, Mr. Jones' individual request fails to meet the substantive requirements of Title 30, Section 55.250 of the Texas Administrative Code. Mr. Jones is not an interjacent water right holder, his statement of interest is conclusory, and TCEQ staff have determined that the change requested in the Application would have no practical effect on any water right. As a consequence, the Association has failed to demonstrate that any of its purported members would otherwise have standing to request a hearing on Application 14-1333A in their own right, and thus the Association has no standing under Title 30, Section 55.252(a)(1) of the Texas Administrative Code to request a hearing on the Application.

Section 55.252(a) also requires that the Association demonstrate that the interests it seeks to protect in its requests are germane to the organization's purpose.¹³ The Association has made no such demonstration. In addition to its substantive failures in establishing standing

¹² 30 Tex. Admin. Code § 55.252(a)(1) (2012).

¹³ *Id.* § 55.252(a)(2).

discussed above, it also has no standing under Title 30, Section 55.252(a)(2) of the Texas Administrative Code to request a hearing on the Application.

The third requirement that the Association must meet to demonstrate the requisite standing to make its hearing requests is that neither the claim it asserts, nor the relief it requests, requires the participation of its purported individual members listed.¹⁴ The Association has made no such demonstration. In fact, the statements made in the hearing request submitted by A. J. Jones belie any argument that the Association may make that it does not need to prove the individual circumstances of its members to obtain the relief it seeks in the requested hearing.¹⁵ Because the Association is unable to demonstrate that neither the claim it asserts nor the relief it seeks requires the participation of any of its purported individual members, it also has no standing under Title 30, Section 55.252(a)(3) of the Texas Administrative Code to request a hearing on the Application.

The Concho River Basin Water Conservancy Association's requests should not be granted.

6. Kenneth Schwartz

Kenneth Schwartz submitted a hearing request on his own behalf on September 24, 2009. While this request appears to have been timely submitted, it nevertheless fails to satisfy the substantive requirements of Title 30, Section 251 of the Texas Administrative Code. Specifically, despite the clear requirements of Section 55.251(c)(2) to briefly, but specifically, describe how and why the change proposed in the Application will affect the requestor, nothing in this request gives any indication of how, or why, the Application will affect the rights provided by COA Nos. 14-1351 or 14-1354.

In addition, TCEQ staff have determined that the change requested in the Application would have no practical effect on any water right. Given this fact, it would appear to be particularly incumbent upon Mr. Schwartz to identify with some specificity how and why his water rights will be impaired by Application 14-1333A. Unfortunately, the request does neither.

Accordingly, this request fails to identify any justiciable interest affected by the Application. As a consequence, it is impossible to determine that this requestor is an affected person using any relevant factors, including those enumerated in Title 30, Section 55.256 of the Texas Administrative Code.

Kenneth Schwartz's request should not be granted.

V. CONCLUSION

Because none of the requestors were able to identify a justiciable interest that would be impacted by the changes proposed in Application 14-1333A, Commission rules do not support declaring any one of them to be an "affected person." Therefore, pursuant to Title 30, Section

¹⁴ *Id.* § 55.252(a)(3).

¹⁵ *See Tex. Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 448 (Tex. 1993) (recognizing that the third prong of the associational standing requirement is met only where the association seeks "prospective relief, raises only issues of law," and is without the need to "prove the individual circumstances [of its members] to obtain relief").

55.255(a)(1) of the Texas Administrative Code, because none of the requestors have demonstrated that they are "affected persons" under the standards articulated in Subchapter G, San Angelo respectfully requests that their hearing requests each be denied and that the Application be granted.

Respectfully submitted,

LLOYD GOSSELINK
ROCHELLE & TOWNSEND, P.C.
816 Congress Avenue, Suite 1900
Austin, Texas 78701
TELEPHONE: (512) 322-5855
FAX: (512) 472-0532

By: 

JASON T. HILL
State Bar No. 24046075
AMY M. EMERSON
State Bar No. 24059721

AND

TOM C. MASSEY
State Bar No. 13172000
MASSEY, BALLENTINE & PSENCIK, P.C.
202 West Twohig, Suite 200
San Angelo, Texas 76902
TELEPHONE: (325) 653-2448
FAX: (325) 655-9917

TIMOTHY L. BROWN
State Bar No. 03176000
LAW OFFICES OF TIMOTHY L. BROWN
1600 West 38th Street, Suite 206
Austin, Texas 78731
TELEPHONE: (512) 371-7070
FAX: (512) 450-0389

ATTORNEYS FOR APPLICANT
CITY OF SAN ANGELO